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Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Washington, D.C.

In the Matter of: **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	)	**Docket No. 21-CRB-0001-PR (2023-2027)**

AMAZON'S OPPOSITION TO THE MOTION FOR SUSPENSION OF THE VOLUNTARY NEGOTIATION PERIOD AND SUBSEQUENT CASE EVENTS AND DEADLINES

Amazon.com Services LLC ("Amazon") opposes the Motion for Suspension of the Voluntary Negotiation Period.[1] The delay this eleventh-hour Motion seeks is extraordinary. Just days before the close of the Voluntary Negotiation Period, it asks the Judges to freeze this proceeding for months on end – how many the Movants cannot say – and substantially postpone the Judges' rate determination. The Copyright Act does not permit such delays. The Voluntary Negotiation Period "shall be 3 months" – no more, no less. 17 U.S.C. § 803(b)(3)(B). The statute likewise requires the Judges to issue their rate determination by December 16, 2022. *Id.* § 803(c)(1). The Motion asks the Judges to violate the first provision, and the long postponement it seeks would all but ensure that the Judges violate the second.

Practical considerations also weigh against the prolonged delay the Motion urges. The proposed stay would likely push the Judges' Initial Determination well into 2023. Yet the Movants also propose keeping a January 1, 2023 effective date for the new rates. The result – a lengthy period for which the parties would learn their rates only well after the fact – would rob

[1] The May 6, 2021 Motion was filed by Google LLC; Spotify USA Inc.; Pandora Media, LLC; the National Music Publishers' Association; Nashville Songwriters Association International; and George Johnson ("Movants").

Amazon (and others) of needed business certainty. It also would require the Judges to engage in unlawful, retroactive rate-setting. And the delay would balloon the parties' litigation costs by forcing them to stop and start their preparation midstream. Those consequences outweigh whatever benefit may be gained from waiting for the *Phonorecords III* remand result, which will apply a different rate-setting standard from the willing-buyer-willing-seller standard applicable here. The Movants' concerns may later warrant supplemental filings, but they do not justify grinding this proceeding to a halt. The Motion should be denied.

ARGUMENT

I. THE JUDGES LACK AUTHORITY TO SUSPEND THE VOLUNTARY NEGOTIATION PERIOD

The Motion fails at the threshold because it conflicts with the Copyright Act. Under the statute, the "voluntary negotiation period . . . *shall be* 3 months." 17 U.S.C. § 803(b)(3)(B) (emphasis added); *see* 37 C.F.R. § 351.2(a) ("[t]he voluntary negotiation period shall last three months"). The word "shall" is "mandatory" and "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Congress's mandatory language forecloses the relief the Motion seeks. Because the Voluntary Negotiation Period began on February 12, 2021, it "shall" end three months later. *See* Notice of Participants, Commencement of Voluntary Negotiation Period, and Case Scheduling Order at 5 (Feb. 9, 2021) ("Scheduling Order"). The Judges lack authority to supplant that three-month period with the longer one the Movants propose. *See Allegheny Defense Project v. FERC*, 964 F.3d 1, 15 (D.C. Cir. 2020) (rejecting attempt to "delete the thirty-day time limit . . . from the statute" and replace it with a rule under which the agency "can take as much time as it wants").

Nor can the Judges lengthen the negotiation period by "suspending" it. *See* Motion at 3. The statute's deadline means what it says: the negotiation period must end three months after it

starts. The Movants cannot evade that deadline by simply stopping the clock in the middle. *See Allegheny*, 964 F.3d at 14 (rejecting agency "tolling" order that did nothing "more than stall for time" under statutory deadline). If that were all it took to evade a statutory time limit – freezing time midway through – Congress's deadlines would lose all force. The Judges recognized as much in *Web II*, when they denied a similar request to bifurcate the "60-day discovery period" under § 803(b)(6)(C) into two separate 30-day periods. Order, No. 2005-1-CRB-DTRA (Nov. 8, 2005). The Judges did so because the statute could not reasonably "be interpreted to mean something other than *60 consecutive days* for the discovery period." *Id*. (emphasis added). The same reasoning precludes the Motion's request to chop up the Voluntary Negotiation Period into pieces here. Construing "3 months" in § 803(b)(3)(B) to mean anything besides *three consecutive months* would nullify the deadline Congress imposed.

The Act's structure supports that conclusion. The Voluntary Negotiation Period forms part of a broader framework that "sets forth specific time periods for the various procedural and substantive steps participants must complete throughout a ratesetting or distribution proceeding." H.R. Rep. 108-408, at 34 (2004). Congress calibrated those periods to serve one overarching goal: to make "certain there will always be a new rate in place prior to the expiration of an old rate." *Id*. Here, that means adhering to a schedule that allows for a new rate decision to issue before the current rates expire on December 31, 2022. And because the statute's other deadlines are keyed to the end of the Voluntary Negotiation Period, *see* 17 U.S.C. § 803(b)(6)(C)(i), up-front enforcement of the three-month limit is vital to the parties' ability to stay on schedule. Indeed, in providing for the negotiation period, Congress "expect[ed] the [Judges] to act in a manner which ensures that the timetable for proceedings are adhered to." H.R. Rep. 108-408, at 30. Suspending the Voluntary Negotiation Period would flout that intent.

The Motion also risks forcing the Judges to violate a related statutory deadline. Because the *Phonorecords III* rates will expire on December 31, 2022,[2] the Judges must issue new rates "in no event later than" December 16, 2022. 17 U.S.C. § 803(c)(1). The Scheduling Order recognizes that statutory deadline, setting (at 5) the Initial Determination for "not later than December 16, 2022." Yet the Motion would make it virtually impossible to meet the deadline. Exactly how long a delay the Motion will create is unclear – the parties do not yet even have a full schedule for the *Phonorecords III* remand – but it will be substantial.[3] And a long delay will all but ensure the Judges miss the December deadline. That deadline currently falls 11 months after the parties' post-discovery settlement conference under § 803(b)(6)(C)(x). *See* Scheduling Order at 5. The Motion would likely postpone that conference by many months – thrusting it well into 2022 – thus dramatically shrinking the 11-month window to complete the proceeding. Indeed, the Motion would likely leave the Judges with only a few months (at most) to conduct a hearing, receive post-trial briefs, and issue a determination. Amazon is unaware of any proceeding in which a determination has been issued on so truncated a schedule.

The Motion asserts (at 4 n.3) that the § 803(c)(1) deadline does not apply because "*Phonorecords* rates and terms do not expire by statute." But nothing in the deadline-setting provision requires expiration *by statute*. The clause setting the deadline refers instead to rates "that expire on a specified date," with no suggestion that the statute itself must mandate the

[2] *See Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 371 (D.C. Cir. 2020) (noting the *Phonorecords III* proceeding sets "rates and terms for the January 1, 2018 to December 31, 2022 period"); Order Denying Copyright Owners' Motion to Adopt Interim Rates & Terms Pending The Remand Determination at 4, No. 16-CRB-0003-PR (2018-2022) (remand) (Dec. 21, 2020) ("the Remand Determination shall be applicable to the entire rate period from 2018 through 2022").

[3] *See* Order Adopting Schedule for Proceedings on Remand at 2-3, No. 16-CRB-0003-PR (2018-2022) (remand) (setting reply brief deadline of July 2, 2021 and noting the Judges will later determine "whether to request additional briefing, oral argument, and/or live testimony"). Given the size of the submissions to date – including testimony from five fact witnesses, reports from three experts, large document productions, hundreds of pages of briefs, and multiple discovery disputes – the remand proceedings do not appear likely to end in the near term.

expiration. 17 U.S.C. § 803(c)(1). It thus differs from § 803(d)(2)(A), which uses distinct language to impose retroactivity "[w]hen *this title provides* that the royalty rates and terms that were previously in effect are to expire on a specified date." *Id.* § 803(d)(2)(A) (emphasis added). Congress's omission of similar language in § 803(c)(1) is strong evidence it did not intend the Movants' interpretation. *See Huerta v. Ducote*, 792 F.3d 144, 152 (D.C. Cir. 2015) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally.") (cleaned up).

Further, the Judges have made clear the *Phonorecords III* rates will "expire on a specified date," 17 U.S.C. § 803(c)(1) – on December 31, 2022. *See supra* note 2. The participants' supposed agreement to a rate period ending on that date was the key premise of the D.C. Circuit's decision rejecting the Services' retroactivity challenge to the Judges' last determination. *See Johnson*, 969 F.3d at 377-78 ("*each party* included in its [filings] a designation of the rate period as January 1, 2018, through December 31, 2022"). And both the Copyright Owners and the Judges stressed that agreement in litigating the issue on appeal.[4] Having convinced the D.C. Circuit that everyone had agreed to a rate period ending in 2022, those participants cannot reverse course now by advocating (Motion at 4 n.3) a new open-ended timeframe. *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). That is why the Scheduling Order recognizes (at 5) that the Initial Determination must issue "no later than" December 16, 2022. The Movants identify no reason for the Judges to deviate from the statutory deadline they already recognized.

[4] *See* Final Brief of Intervenors National Music Publishers' Association & Nashville Songwriters Association International at 38, *Johnson v. CRB*, No. 19-1028 (D.C. Cir. Jan. 10, 2020) ("[T]he Board has made clear since initiating these proceedings in 2016 that it was setting rates for the period of January 1, 2018, to December 31, 2022."); Final Brief for Appellees at 81, *Johnson v. CRB*, No. 19-1028 (D.C. Cir. Jan. 10, 2020) ("Since the inception of this proceeding in January 2016, the Judges made clear that they would be determining rates and terms from 2018 until 2022."). Amazon disagreed with those arguments on appeal but lost the point at the D.C. Circuit. Amazon thus litigates this motion taking the facts as the D.C. Circuit found them.

The Movants do not seriously contend their proposal will allow for a rate determination by the end of 2022. *See* Motion at 10 (proposing "No Deadline" for that determination). Instead, they appear content with this proceeding slipping well into 2023. Whether or not such a result might be convenient (*but see infra* Part II), it conflicts with the Copyright Act's plain language. It also defies Congress's intent to "ensure[ ] that decisions are rendered in a timely fashion" so that "there will always be a new rate in place prior to the expiration of an old rate." H.R. Rep. 108-408, at 34. That alone is reason enough to deny the Motion.

II. THE PROPOSED STAY WOULD BE COSTLY AND INEFFICIENT

Even if the Judges had authority to stay the Voluntary Negotiation Period, they should decline to do so. The proposed stay contradicts the Judges' obligation to promote "efficient and just administrative proceedings." 37 C.F.R. § 303.8. Three considerations make that clear.

First, the suspension would create destabilizing rate uncertainty. As noted above, the Motion would likely delay the Judges' determination until well *after* the January 1, 2023 date on which the rates are meant to take effect. That would leave a substantial gap – covering at least the first part of 2023 – subject to retroactive rates that the Judges would announce only after the fact. *See* Motion at 5 (proposing that the "January 1, 2023 effective date" be "maintained," subject to retroactive adjustments). The resulting uncertainty would deprive Amazon (and others) of needed predictability and impede its business-planning efforts. So disrupting Amazon's "settled expectations" undermines "[e]lementary considerations of fairness." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Industry participants, including Amazon, "should have an opportunity to know what the law is and to conform their conduct accordingly." *Id*. The Motion's request for retroactive rate-setting frustrates that core principle.

The Movants have elsewhere recognized those very concerns. In their *Phonorecords III* remand proposal, the other Services joined Amazon's position that "continued uncertainty as to the final rates and terms" would "burden[ ] both the Services and Copyright Owners, all of which are trying to make business and financial decisions" based on future rates. Services' Proposal for Remand Proceedings at 12, No. 16-CRB-0003-PR (2018-2022) (Dec. 10, 2020). The Copyright Owners expressed a similar concern. *See* Copyright Owners' Proposal for the Conduct & Schedule of the Remand at 3, No. 16-CRB-0003-PR (2018-2022) (Dec. 10, 2020) (calling it "vital" to end "uncertainty about rates and terms that are retroactive"). The indeterminate delay the Movants seek now would stoke the very rate uncertainty to which they otherwise object.

Second, the Motion's proposed retroactivity is independently unlawful. It is "axiomatic" that "a statutory grant of legislative rulemaking authority will not . . . be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The Copyright Act gives the Judges no such power. Because the statute itself does not "provide[ ]" for the *Phonorecords III* rates to "expire on a specified date," 17 U.S.C. § 803(d)(2)(A), the new rates will take effect by default only after their publication in the Federal Register, *id*. § 803(d)(2)(B). And nothing in the statute gives the Judges authority to make those rates retroactive to a date that precedes their initial determination.[5] Inferring such authority conflicts with the cardinal

[5] The D.C. Circuit allowed the November 5, 2018 final determination in *Phonorecords III* to have an effective date of January 1, 2018. *See Johnson*, 969 F.3d at 377-80. But it did so under a separate clause that allows a different effective date "as agreed by the participants in a proceeding." 17 U.S.C. § 803(d)(2)(B); *see Johnson*, 969 F.3d at 377 (finding participants had "agreed to" the earlier date). Here, there is no such agreement. Amazon objects to any effective date that deviates from the default under § 803(d)(2)(B) and has not agreed to retroactive rate-setting. To the extent Amazon's filings in this proceeding appear to contemplate a January 1, 2023 effective date, they do so only on the assumption that the Judges will adhere to a schedule that allows the new rates to take effect lawfully on that date (Amazon includes "2023-2027" in the caption of this filing because the rules require the caption to include the official docket number, which includes that text). And although the Movants contend (at 5-6) that the Board has independent authority under § 803(d)(2)(B) to retain an earlier effective date, they cite no

"principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Landgraf*, 511 U.S. at 265 (cleaned up).

Third, the proposed stay would be wasteful and inefficient. Mindful of the schedule the Judges adopted, Amazon has already invested substantial time and money in preparing its case. It has gathered documents, interviewed potential fact witnesses, begun expert work, and made substantial progress developing and refining a rate proposal – all with an eye toward meeting the Judges' September 10, 2021 deadline for written direct statements. *See* Scheduling Order at 5. Halting all that work midstream would be burdensome. Indeed, the proposed stay would require Amazon (and presumably others) to stop its ongoing preparation for some indeterminate period, only to resume the same work many months later. Amazon would risk its experts becoming unavailable; needing to re-interview witnesses to account for new facts or fading memories; and being forced to re-engineer the work it is now preparing. Such stopping and starting – and the duplication of effort it would entail – is the opposite of "efficient." 37 C.F.R. § 303.8.

III. THE MOVANTS' JUSTIFICATIONS FOR THE STAY ARE UNPERSUASIVE

The Motion urges (at 3-4) the Judges to delay this proceeding to allow the parties to prepare their direct cases with the benefit of the *Phonorecords III* remand determination. That asserted benefit, which the Movants overstate, provides no basis for a long stay.

The *Phonorecords III* remand decision will apply the four-factor § 801(b) standard rather than the willing-buyer-willing-seller standard that governs *Phonorecords IV*. *Compare* 17 U.S.C. § 801(b) (2017) *with* 17 U.S.C. § 115(c)(1)(F) (2019). Given the change in standard, the Movants have not shown that the former's implications for the latter will be sufficiently substantial to warrant a long stay. And the parties can later address such implications (if any) in

precedent upholding such authority absent agreement of the parties. *See Johnson*, 969 F.3d at 377 n.9 (rejecting "late-breaking" attempt to invoke the Judges' asserted authority to "otherwise provide[ ]" for earlier effective date).

the same way litigants typically address intervening legal decisions: by submitting supplemental briefs as appropriate. Depending on the circumstances, Amazon might even support a procedure allowing the parties later to submit supplemental evidence narrowly tailored to any issues raised by the *Phonorecords III* determination. Such submissions may not prove necessary at all. Or the timing may allow the parties to incorporate them into their rebuttal cases in the ordinary course – or perhaps with a modest delay of weeks, not months. But if some extra procedure does become necessary, the parties should negotiate and propose one consistent with the existing schedule.[6]

Nor can the Motion even guarantee (at 5) that the participants will "know[ ] the outcome of the *Phonorecords III* remand" before submitting their direct cases. The *Phonorecords III* determination may be subject to rehearing motions, *see* 17 U.S.C. § 803(c)(2), and another round of appellate review by the D.C. Circuit, *id.* § 803(d)(1). Yet the Motion proposes restarting this proceeding without waiting for the outcome of either. The risk that the *Phonorecords III* remand determination might change even after the Movants' stay further undercuts its rationale.

The Movants' suggestion (at 3) that a stay would promote "settlement discussions" is no more persuasive. They filed the Motion with only five business days left in the Voluntary Negotiation Period; just two days now remain. The Movants do not represent that any settlement talks have progressed sufficiently for their eleventh-hour stay to have any real benefit. If uncertainty over the *Phonorecords III* remand were truly an impediment to otherwise-promising settlement discussions, the Movants would have sought relief much earlier in the process. And by its own terms, the Motion seeks (at 9) to end the negotiation period the *first day* after issuance of the *Phonorecords III* remand determination. That will leave no time for any voluntary talks in

[6] To be sure, the *Phonorecords III* remand determination may address issues relevant to this proceeding. For example, the voluntarily negotiated settlement in *Phonorecords II* (currently at issue in the remand) may prove to be a useful benchmark here. For that reason, the Judges might say something on remand about the *Phonorecords II* settlement probative of its utility in this proceeding. But that possibility does not warrant a multi-month stay.

the wake of the remand. Accordingly, the Movants cannot explain with any specificity how knowing the *Phonorecords III* result will promote the likelihood of a settlement here.

In the end, the Movants' solution is worse than the problem they seek to fix. Whatever issues the *Phonorecords III* remand may raise here, they do not outweigh the legal and practical problems a stay would introduce. And while the former can be addressed in the ordinary course, the damage done by the latter would be irreversible. The Judges should not upend this entire proceeding just because some future ruling might prove relevant at the margins.

CONCLUSION

The Judges should deny the Motion.

May 11, 2021

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Tuesday, May 11, 2021, I provided a true and correct copy of the Amazon's Opposition to the Motion for Suspension of the Voluntary Negotiation Period and Subsequent Case Events and Deadlines to the following:

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Signed: /s/ Joshua D Branson